United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

UNITED STATES OF AMERICA

v.

ALLEN D. BROOKS,

Appellant.

September Term, 1969

Appeal No. 24,055
(Criminal No. 26-69)

BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA, CRIMINAL DIVISION

Hon. Oliver Gasch, Judge

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STATEMENT OF ISSUES

The appellant presents the following issues for review:

I. Did the Court err in failing to allow voir dire examination as to possible bias against the defendant for disrespect to and failure to cooperate with or respond to a teacher or police officer?

II. Did the Court err in failing to allow the defense to elicit whether the defendant had been charged with disorderly conduct arising out of the incident which allegedly led to his arrest?

III. Did the Court err in refusing to grant Motion for Acquittal and allowing case to go to the Jury on the issues of assault, legality of arrest, and reasonableness of force maintaining arrest, and whether Jury verdict was contrary to the law and the evidence?

IV. Did the Court err in overruling defense objection to whether defendant was trying to defend the teacher, Dildy?

V. Did the Court err in refusing to grant mistrial based on closing argument of Government counsel, extolling the credibility and veracity of the Government's witnesses, based on occupational statuses, principals and teachers, as an appeal to sympathy and bias?

VI. Did the Court err in instructing the Jury that if a police officer, engaged in the performance of his duties, seeks to maintain a lawful arrest and does not use unnecessary force in so doing, that the defendant has no right to resist and must submit and allow the determination of legality of arrest to be made later by the Court?

Rule 8(d) Statement

This case has not previously been before this Court.

Reference to Rulings

This appeal is from a judgment of conviction and commitment under Section 5010(b) of the Federal Youth Correction Act after Jury verdict of guilty under the second count of a two count indictment charging assault on a police officer, 22 D.C. Code 505(a). Said Judgment was imposed on February 17, 1970.

STATEMENT OF THE CASE

The defendant was charged with assault with a dangerous weapon, shod foot, on a school teacher, and assault on a police officer under 22 D.C. Code 502, 505(a), respectively. (R1). Case was tried to a jury on November 20 and November 24, 1969, on which latter date the jury retired to consider its verdict. Verdict was rendered on November 25, of not guilty on Count I and guilty on Count II, being assault on a police officer. (R15). Judgment of conviction was entered by the Court, Honorable Oliver Gasch presiding, on February 17, 1970, and the defendant was sentenced under the Federal Youth Correction Act, 18 U.S.C. Section 5010(b). (R16). This appeal was duly noted on the same date. (R18).

In substance, the defendant, who was eighteen years of age at the time of the alleged incident, was a student at Anacostia High School, and was alleged on Friday, November 8, 1968, to have assaulted, Count I, Jimmie L. Dildy, a teacher at said school, and Count II, Officer Gratton of the Metropolitan Police Force, who was called in to investigate the incident. Counsel on voir dire examination sought to ascertain from the potential jury panel whether or not they felt it was incumbent upon an individual, regardless of circumstances, to cooperate or respond to an officer, and to respond to questions put by an officer. The defense further sought to ascertain whether or not the jury would be influenced against the defendant on what may have been or appeared to be disrespect to either a teacher or a police officer. The Court denied these requests on the grounds that respect or disrespect was not an issue in the case, and further a citizen has a duty to respond to general inquiries by a police officer. (T20-24).

The complainant, Jimmie L. Dildy, testified that he was a teacher at Anacostia High School, and on Friday, November 8, 1968, at approximately 1:30 p.m., he was assaulted by a group of boys, which group included one, Erwin Corlley, and the defendant, Allen D. Brooks, both of whom were students at the school at the time. (T49-53,60).

An English teacher, William Albert Fry, and a Spanish teacher, Marian Ethel Howard, testified and corroborated that Mr. Dildy had been assaulted at the time and place stated. Mrs. Howard, in seeking assistance, contacted Harold M. Lieberman, another teacher, and Russell A. Lombardy, who was then Assistant Principal at Anacostia High School. (T86,88). Mr. Lieberman, upon arriving at the scene, noticed two individuals had been seized, (T101) and that another teacher who had arrived at the scene, Mr. E. Franklin Kersey, had thrown one of the two men to the floor. (T102). The two men were asked by Mr. Lombardy to move down to his office and cause no trouble. They were cooperative and did so. (T102). The defendant was one of the men taken to the office of Mr. Lombardy and ultimately one of the men removed from the office by the police. (T103). Although the defendant was found not guilty of the assault on Mr. Dildy, some reference will be made herein to the factual testimony regarding the assault on Mr. Dildy as may have bearing on the guilty finding on Count II, particularly with reference to issues of arrest and excessive force.

Mr. Lieberman testified for the Government that the man who was holding Mr. Dildy also hit Mr. Lieberman and subsequently disappeared. The incident occurred on a Friday and the school was beset, particularly on Fridays, with the problem of outsiders in the school. Mr. Lieberman made available the identity of the man who was in contact with Mr. Dildy, to both

the principal and police, and thought that he was going to be arrested, but ultimately this was not done. This man was quite evidently neither Corlley nor the defendant. (T105-106, 115).

Mr. Kersey, the teacher at Anacostia mentioned preceding, testified he saw Dildy, Lombardy, and Roush (a custodian at the school), wrestling with two individuals. During the course of the same, Lombardy pushed one on the floor, and as he was getting back up the witness grabbed and held him. The defendant Brooks was the one held by the witness. (T120). After being held for five or ten minutes by Mr. Kersey, Mr. Brooks calmed down and walked downstairs to the Principal's office and was left there. (T122). When Mr. Brooks was left at Mr. Lombardy's office, there were some police officers there. Later he saw the defendant being led by the police and restrained. He was not willfully walking, but was resisting attempts to be put in the police car. The police and the defendant were struggling in the back of and beside the police car. Other officers came to assist. (T124). He saw a police officer look in the car and all of a sudden appeared to just fall back. The door of the car was open at the time. (T125). When this witness first saw the defendant in the school hallway, the defendant was on the floor. After holding the defendant, the defendant became calm and there was no problem whatsoever. (T127,129).

When the witness took Mr. Brooks to the office of Mr. Lombardy, there were two police officers there, as well as the teacher, Mr. Lieberman, mentioned preceding. In addition, the other student, Erwin Corlley, was also there. He saw Brooks struggling with a police officer in the office and then taken outside. He was taken by the shoulder and elbows and placed in a squad car and forced in. (T130,131). It was this witness's observation that the car was parked right side to the curb and that the defendant was put in the left rear door on the street side. At the time of this observation, the car

was between the witness, who was on the school side, and Officer Gratton and the defendant. (T134). While Brooks was being taken to the squad car, he heard someone say "Don't put handcuffs on them. They will go without it", or words to that effect. (T137). The police officers were in physical contact with the defendant in one form or another from the principal's office to the squad car. (T139).

Russell Augustus Lombardy, present Principal at Anacostia, and formerly Assistant Principal at the time of the incident, testified for the Government. (T141). In response to Mrs. Howard's call for assistance, he went to the scene of the incident where Mr. Dildy was being assaulted. There were one hundred to one hundred and fifty students in the hall, and he observed Corlley and the defendant and the teachers Lieberman and Dildy. He testified that Corlley and Dildy were fighting and that defendant was facing Mr. Lieberman. He grabbed the defendant and threw him back to Roush, the custodian. Corlley was subdued and both were asked to walk to the office. (T143). Lombardy went to the office and he told the two students to sit down and get their stories straight, because they were going to be locked up. They were asked to tell what happened and they did. Some police officers came in with riot sticks. (T144). Corlley and Brooks were sitting down and talking rationally. (T145). Lombardy left the office to clear the halls, and at that time two officers were in his office. (T147-148).

Mr. Lombardy also confirmed that there had been interloper problems in the hallways. (T152). In the hall, at or near the scene of the incident, Lombardy observed that the defendant appeared woozey. Mr. Lombardy testified that defendant may have been strick or hit his head against the wall, and that Lombardy did not have the difficulty with him that he had with the other man (presumably Corlley). (T154).

On cross-examination, it was shown that when Lombardy was in the office with Corlley and Brooks, there was doubt as to what precisely had occurred, and all there were interested in "getting at the bottom of things". (T158), The witness repeated that in the hallway, the defendant looked woozey as if he had been hurt. (T159).

The complainant, Officer David Charles Gratton, had been on the Metropolitan Police Force for twenty-three months prior to the incident. Prior to that he had been in the United States Army. On the date of the incident, he was assigned to the Special Operations Division, Uniform Tactical Force, with his partner, Officer Robert Budd, in Scout Car 113. (T177-178). Gratton arrived at the high school in response to a run for assault report, and came to the conference room adjacent to Mr. Lombardy's office. The students, Corlley and defendant Brooks, were there. (T179). Lombardy was also there, and in addition, Officer Lancaster from Scout 117 who had been sent on the run to assist. (T180). Lancaster and Mr. Lombardy also left the office to talk alone. There were left, in addition to Officer Gratton, Officer Budd, Corlley and Brooks.

Brooks stood up and was boisterous and disorderly, and shouted obscenities to both officers in regard to some of the teachers and staff at Anacostia. Gratton told the defendant to maintain his order and sit down, and that Brooks was in enough trouble and should not persist with his actions. Defendant did not sit down and Officer Gratton then put his hand on his shoulders and told the defendant to sit down and that he was bordering on disorderly conduct. He further told defendant not to get himself into anymore trouble than he was already in. At this time, the defendant took a swing at

Gratton. Gratton, in response, put a restraining hold on Mr. Brooks, and maintained it for four or five minutes. Gratton took Mr. Brooks out to the cruiser in that hold. (T181-182). The restraining hold was described on direct as a yoke hold in which one arm is put in front of the throat and the wrist of that arm grabbed with the other hand. (T183).

In the course of taking the defendant to the Squad Car from the school office, the defendant broke the hold by hitting the officer in the right side with his elbow. Lancaster, with another officer assisting, put handcuffs on the defendant. This was done by having him on the ground on his stomach with his hands put behind his back and handcuffed in that fashion. (T183-185). Gratton admitted that he and Lancaster carried blackjacks, but denied using them. He stated that it wasn't necessary. (T184-186).

After handcuffing, the defendant was told by Officer Gratton to have a seat in the squad car (the left rear door), and the defendant was then placed in the squad car during which he fell back on his back on the seat and hit Officer Gratton about the face and chest by kicking him. Gratton was kicked twice in the face and twice in the middle chest area which caused him to fall on his back. (T188). Gratton's testimony was that at that time, the vehicle was parked with its left side to the curb. The officer was subsequently treated for the injuries at Cafritz Hospital and at Washington Hospital Center.

On cross-examination, it was brought out that there was confusion as to what had happened regarding the incident involving Dildy, and Gratton interrogated Corlley and Brooks regarding the same. Gratton, Budd, Corlley and Brooks were in the office at the time. Gratton sought to interrogate Corlley and Brooks. The defendant wouldn't cooperate and didn't want to sit

in a chair. He refused to sit down and Gratton then put his hands on defendant's shoulders and asked Brooks to sit down when Gorlley also grabbed him. Defendant swung at the officer. Gratton and Brooks then tussled back and forth and then the restraining hold was used by Gratton on Brooks. (T191-194). The hold was learned in the Service and could be used for killing. The application of force by the arm around the throat makes breathing difficult commensurate with the amount of force applied. Increase of pressure produces this result. (T195-196). This hold was maintained on the defendant through the hallway, two steps down steps to the street, and almost to the car. (T196). The distance in transit in which this hold was maintained was approximately four times the length of the Court Room, a distance of approximately two hundred feet. (T197).

When Gratton got Brooks at or near the cruiser, the hold was broken. At that point, when Mr. Brooks was face down on the ground, Gratton told him to calm down, he was being arrested, and to stop struggling. (T199). When handcuffed from the back, Gratton took one side of Mr. Brooks and Officer Lancaster the other, underneath the arms and shoulders, and lifted Brooks up off the ground, and put him in the squad car backwards, at which point Gratton was kicked. (T201-202).

Gratton was asked whether the defendant was charged with disorderly conduct, and the Court sustained the Government's objection to that question.

Gratton further testified that in the Principal's office he advised the defendant he was being detained pending investigation of an assault. (T203). Gratton first denied that he had testified at the preliminary hearing held in this case on November 21, 1968. (T204). The Government subsequently

stipulated that he did so testify. (T205). Officer Gratton did not recall his testimony at the preliminary hearing despite the stipulation. A recess was declared and the officer read the preliminary hearing transcript during said recess. (T205-206).

Officer Gratton then admitted he testified at the preliminary hearing, and testified at that hearing that the defendant was sitting in a chair and Gratton forced him back into the chair. Defendant stood up again. He was not under arrest at the time when the officer made him sit down. He was a suspect in a simple assault matter and Officer Gratton reiterated to the preliminary hearing Judge that he was not under arrest. (T207-208). Defendant took a swing at Officer Gratton at that time, and from preliminary hearing transcript Gratton grabbed and conceded that he then choked Brooks, but presumably the word meant yoked (he put his arm around defendant). (T209-210). Officer Gratton conceded from the transcript that he had testified at the preliminary hearing that the defendant broke away from him and Officer Lancaster grabbed him and put his knee in the small of the defendant's back. As of this time, the assault complained of on Officer Gratton had not been made. (T210). Also Gratton further testified that after Brooks was placed in the squad car and the door was shut, it was reopened by Gratton, as he thought the defendant was going to damage the interior screen or upholstery in the vehicle. (T211-212).

On redirect examination by the Government, Gratton testified that when he arrived at the scene, he observed Corlley and Brooks with their clothing disarrayed. Lombardy pointed out that they were involved, which led the officer to believe that Corlley and Brooks should be detained for further investigation.

They were technically under arrest for assault unless things were found to be different; and that he took Brooks into custody after he became disorderly and attempted to assault the officer in the office. (T219). On re-cross Gratton further testified that Lombardy had called the police to try to determine what happened, and that the boys that were in the office were to be initially interrogated to try and find out what had happened. (T222).

When Gratton's partner, Officer Budd, came to Lombardy's office with Gratton, Corlley and the defendant and a teacher were there. Mr. Lombardy and also Mr. Lancaster, who evidently came somewhat later, left the room leaving the two students, Gratton and the witness Budd. The four were in the room at some length and the officer tried to ascertain what the problem was. (T239-240). According to Budd, Brooks became belligerent, was jumping up and down, swinging his arms around. Gratton told him to sit down, at which time Brooks used obscenities and took a swing at Gratton. Gratton grabbed him from the back in a restraining hold and removed Brooks with Officer Lancaster (T240-241). Later outside, Budd observed a large crowd and Officer Gratton was bending over and bleeding from the mouth and holding his chest. Brooks was evidently in the squad car with his feet hanging out. (T240-241, 244). Brooks was lying on his back in the car and his feet from the knees down were outside the vehicle. (T247).

Officer Charles A. Lancaster testified as to the incident in the office, and said that Gratton was attempting to restrain the defendant. There was more or less a pushing between them and Gratton asked Mr. Brooks to sit down and be calm. The defendant jumped up and both started grappling, falling over on chairs and tables. Gratton then put a carrier hold on the defendant. (T255).

Government rested at the conclusion of Officer Lancaster's testimony. Defense motion for acquittal was denied. (T266). Corlley had been acquitted of simple assault on Mr. Dildy in the D.C. Court of General Sessions. Evidence of the same was held inadmissible. Corlley, at the time of the trial, was in the U.S. Army and was stationed at Fort Bragg and had come from there to testify. Corlley testified as to the incident in the office. He stated the defendant sat down and stood up as if he wanted some air. The officer shoved him in a chair and grabbed him and dragged him out of the office. (T273). Brooks was shoved in a police car head first and was hit with a police stick. Corlley was also pushed in and hit across the knee with a stick. (T274). Testimony as to what had happened after the alleged assault was excluded. (T275). In Lombardy's office, one of the officers said that he had been to Viet Nam and he could take Corlley and four others. (T275). According to Corlley, Brooks' involvement with Dildy was an attempt to break up a fight between Mr. Dildy and Corlley. (T282-284).

Deborah Corlley, a sister of Erwin Corlley, testified for the defense. She observed police removing the defendant. The defendant asked to be let go so he could walk by himself, but this was not permitted. A blackjack was used by Officer Gratton according to this witness and "jugging" or forcing the defendant into the car. (T288-290).

The defendant took the stand and testified that in the incident in the hall, involving Mr. Dildy and a group of boys, the defendant was hit to the floor. He got up and Mr. Kersey held him. He just remembered going to the Principal's office with Mr. Lombardy, Mr. Kersey and Corlley.

There were present two police officers, Mr. Lombardy, Corlley and himself. Lombardy left the office. The defendant felt dizzy and went to the window to get some fresh air. An officer kept pushing him down, grabbed him by the neck and dragged him outside.(T301-303). Mr. Brooks described the restraining hold by which he was dragged down the steps. He told the officer he couldn't breathe, and when he received no response, tried to get loose. (T303). Near the car, he was handcuffed (T304) and thrown in head first, at which time the top part of his head hit something like the roof of the car. He was on his stomach in the car and was hit on the left leg with the stick at that time. (T306).

An objection was sustained as to whether defendant had been charged with disorderly conduct. (T307). He was not told that he was under arrest while taken out of the school. (T308).

Defendant denied any involvement in the attack on Mr. Dildy, and claimed his only role was trying to break it up. While doing this, he got hit and was knocked to the floor. (T314-315). He reiterated that he was dizzy and attempted to get to the window. (T316). He denied cursing Gratton, although he admitted to resisting him by trying to remove his arms from around his neck. (T317-318). The defendant denied kicking the complainant. (T320).

Harold M. Lieberman, who had testified for the Government, was then called as a witness for the defense. He testified that in Lombardy's office, the defendant began to tell what happened and then stood up and said he wans't going to make any more statements. The officer told him to sit down, but Mr. Brooks did not want to do so. The officer then put his hands on his shoulder and tried to make him sit down, and then the tussle began. Brooks was then

removed in a hammerlock. The witness was not allowed to answer the question as to whether the officer had lost his temper. (T322). On cross-examination, the witness reiterated the foregoing and in addition testified that Brooks went to the window in the corner and was pretty dizzy. (T327).

Dora Brooks, mother of the defendant, was not permitted to testify as to certain matters that the defense alleged occurred at the police station subsequent to arrest, which would have involved allegations of brutality as to the officers. (T330). Prior Motion for Acquittal was renewed and denied. (T332).

In closing argument, Government counsel extolled and emphasized the credibility of Government's witnesses based upon occupational status. Mr. Dildy was referred to as a teacher who had dedicated his life to teaching at Anacostia High School, and who was teaching at another high school at the time of the trial. Mr. Lombardy was referred to as the Assistant Vice Principal of Anacostia High School, who had worked for twenty years in the public schools. Government counsel generally referred to witnesses for the Government as those who taught in the public shcools in the District of Columbia and had given their careers to educating young men and women in the District of Columbia. (T359-360). Mistrial motion based on blatant appeal to the sympathy and prejudices of the jurors by foregoing closing argument was denied. (T361).

The Court instructed the Jury as to assault on a police officer (T391-398) and the issues involved, among others, the legality of arrest, right of reasonable force in maintaining arrest, and right to oppose excessive force. In the course of this instruction, the Court stated that if an officer, in the performance of his duty, sought to make a lawful arrest and did not use

unnecessary force in doing so, one had no right to resist. Further, that if a defendant felt the arrest was illegal and without probable cause, he must nevertheless submit to the arrest and allow a Court later on to decide whether the same was legally justified. (T394). The Court also instructed that no special words were required to be spoken in order to establish an arrest; and that the circumstances which exist determine the status of the arrest. (T395). The defense objected to the instruction as to the necessity of submitting to a bona fide attempt at arrest. The Court reiterated that if the officer sought to make a lawful arrest, defendant must submit and is relegated to the determination of the Court. Further, that it is not necessary to state that one is under arrest. (T398-399).

ARGUMENT

I. The Defendant Should Have Been Allowed To Inquire on Voir Dire of Potential Jury Panel as To Existence of Possible Bias or Prejudice Based Upon Possible Disrespect of The Defendant to The Police, As Well As a Failure to Cooperate and Respond to Them.

This case was tried in the context and background current in our times of ever-increasing violence in the schools involving not only students, but also teaching personnel and staff. It was further tried at a time when there had been an increasing trend of what some might consider disrespect to authority and to the police, in particular, and the increasing concern of communities regarding the same. At the time of trial, a recent Time Magazine article, of nation-wide distribution, had discussed the former. (T22).

The Court was of the opinion that the feeling of the Jury about respect due teachers and policemen was immaterial. The Court was further of the opinion that a citizen must respond to general inquiries by police officers. As a consequence, efforts to inquire of the jurors as to possible bias to defendant for failure to be respectful and responsive to police officers was not permitted. (T22-24).

In the posture of the case and in an effort to select an impartial Jury, the defendant should have been permitted to make his inquiries to ascertain which, if any of the jurors, had strong feelings regarding the requirement of respect and responsiveness, and whether they would be biased or influenced against the defendant because of the lack of the same on his part. Aldridge v. U.S., 283 U.S. 308.

II. Whether the Defendant Was Lawfully Arrested Was a Key Issue, And Particularly in View of The Court's Charge to The Jury That They Might in Determining This Issue, Consider All Attendant Circumstances, Then The Defendant Should Have Been Allowed to Show That He Was Not Charged With Disorderly Conduct.

Although, as discussed (infra), it is difficult to determine when and for what the defendant was arrested, it may be claimed by the Government that defendant was arrested for disorderly conduct occurring in the Principal's office. The defendant was unable to pursue inquiry of Gratton as to whether defendant had been charged with disorderly conduct. (T202-203). Defense was unable to elicit from defendant himself that he had not been charged with disorderly conduct. (T307).

It is true that the propriety of arrest does not depend upon whether the person arrested is convicted of crime for which he was arrested, or whether the arresting officer was legally warranted in making the arrest. Sharpe v. Warden (D.C. Md. 1964) 225 F. Supp. 738). Nevertheless, the simplicity of claiming obscenities as disorderly conduct for misdemeanor justification for an arrest is quite apparent. Further, the Court instructed the Jury here that in determining whether Gratton acted as a reasonable man, they could consider every circumstance leading up to and surrounding the arrests. (T393). Additionally, it should be noted from the preliminary hearing transcript that Officer Gratton also testified at the hearing; that after the profanities he forced the defendant back into his chair and he was not under arrest. Judge Greene of General Sessions Court, at the hearing, inquired several times of Officer Gratton on this point, and was advised each time that he was not under arrest. It would seem under the foregoing circumstances that the Jury should have had a right to consider that in fact the defendant had not been charged with disorderly conduct.

III. There was Insufficient Evidence to Take The Case to the Jury and The Jury's Guilty Verdict Was Contrary to Both the Law and The Evidence.

The defense had moved for a directed verdict of acquittal upon the close of the Government's case, as well as the close of the defense. (T264-266, 332).

> "****Hence we said in the Curley case, that if a judge, is of the opinion that upon the evidence a reasonable man could not find guilt beyond a reasonable doubt, he must not let the jury act, because to do so would be to let it speculate without evidence adequate in law. We expressed it thus: "The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted.' " Cooper v. U.S., 94 U.S. App. D.C. 343, 218 F. 2d 39, Curley v. U.S. App. D.C. 389, 160 F. 2d 229, cert. den. 331 U.S. 37[illegible]. See also Austin v. U.S., 127 U.S. App. D.C. 180, 202 F. 2d 129. Bates v. U.S., 95 U.S. App. D.C. 57, 269 F. 2d. 30, cert. den. 349 U.S. 961.

In determining whether the case should have been taken from the Jury, the Trial Justice not only had to determine the sufficiency of the evidence, but also whether as a matter of law, from the evidence presented, a Jury could determine beyond a reasonable doubt that (1) there was a lawful arrest; (2) that if the arrest was unlawful, Brooks had used excessive force in resistance to an unlawful arrest; (3) that if the arrest was lawful, Gratton had used only reasonably sufficient force to maintain the arrest, and as a consequence Brooks had no right to resist; and (4) that in any event, the extent of Brooks' physical resistance was excessive under any circumstances.

The evidence is in conflict as to (1) whether a baton, blackjack or other instruments were used on the person of defendant when he was placed in the car by the police, as claimed by Brooks, with some support from Erwin Corlley and Deborah Corlley, and denied by all officers; (2) whether Brooks ended up in the squad car on his back or on his stomach; and (3) to a lesser degree whether at that time Brooks kicked Officer Gratton, and that the injuries complained of by Officer Gratton occurred at that time. There is no real dispute that Gratton removed Brooks from the Principal's office in a restraining hold to the vicinity of the squad car (T182); that this restraining hold is a yoke hold involving application of pressure or force by the arm to the throat, which produces extreme discomfort upon pressure and which hold can be used for killing (T183, 195-196); that in this hold the defendant was taken down steps approximately a distance of two hundred feet (T196-197); and that near the car, Brooks who was resisting, broke the hold by striking the officer, and then with several officers involved, was forced to the ground on his stomach, handcuffed, and in that fashion placed in the squad car. (T183-185). It was the kicking at the squad car that constituted the assault complained of. (T188,210). Although Officer Gratton testified that the particular incident occurred when Brooks was being placed in the squad car, it was shown on cross-examination and after refreshment of recollection from the preliminary hearing transcript, that after Brooks had been placed in the squad car, the door was closed, and it was then that Officer Gratton re-entered, ostensibly to prevent the interior of the squad car from being damaged by the defendant. (T211-212).

On the arrest issue, there was considerable confusion as to what had transpired in the hallway with reference to the attack on Mr. Dildy. The number of people in the hallway varied to and included an excess of one hundred. Mr. Lombardy removed Brooks and Corlley to his office to get to the bottom of things, as there was doubt as to what had occurred. (T152). From all witnesses from the Government, it is clear that Brooks voluntarily went with Lombardy to the office from the scene of the incident involving Dildy, and there was no need for any force or restraining hold to compel him to do so. There was an abundance of evidence which was not negated that in the incident involving Dildy, Brooks was struck by someone or something and knocked to the floor. (T301). Lombardy testified that Brooks appeared woozey as if he had been struck or hit against the wall. (T154, 158-159). Mr. Lieberman testified that Brooks was pretty dizzy in the office. (T327).

That there was confusion as to what and who was involved in the assault on Dildy is supported by the fact that no one could identify Brooks as having made contact with Dildy; that Corlley who was charged with simple assault on Dildy in General Sessions, was found not guilty of that offense; and that Brooks was found not guilty by the Jury herein on Count I involving the assault on Mr. Dildy. In this posture, the police came to the Principal's office for the purpose of determining the same thing that Mr. Lombardy sought to determine, namely, what had happened and who was responsible. It was the intention to interrogate Corlley and Brooks for that purpose. (T222). In point of fact, as indicated by Lieberman and Corlley, Brooks, who was dizzy, stood up and went to the window to get some air. (T316). According to Lieberman and Brooks, Gratton ordered him to sit down, but Brooks did not

want to. Subsequently the officer attempted to force him back in his chair, and a tussle between Gratton and Brooks developed. In substance, Gratton's testimony is markedly similar with the exception of the contention of use by Brooks of obscenities. (T181-182, 193-194).

When Gratton entered the office, he stated that Corlley and Brooks were detained pending an investigation of the assault. (T202). Gratton conceded that he testified at the preliminary hearing on November 21, 1968; and that there was an investigation going on regarding conversation about an alleged incident at the school. Brooks was sitting in a chair and Gratton forced him back into the chair. Brooks stood up and Gratton forced him back. He was not under arrest at that time nor when Gratton made him sit down. He was simply a suspect in a simple assault. (T207-208).

It was conceded by Brooks that in the restraining hold he couldn't breathe and tried to break the hold. (T303, 318). Deborah Corlley testified that Brooks had asked the officer to let him go so that he could walk by himself. (T288). Corlley testified that in the office before the tussling, Brooks stated he wanted some air. (T273).

The only reasonable finding that could be adduced from the foregoing was that everyone was in the office for the primary purpose of determining what, in fact, had happened, and the involvement of Corlley and Brooks, if any. Brooks was not under arrest at any time until the tussling between Gratton and himself began, which ended in the application of a restraining hold and removing Brooks from the office to the car. Improper as it may be, Brooks was not required to respond to Gratton or be courteous to him. What then was the basis for the arrest? If the incident involving Dildy had been a simple assault, it

had not been committed in Gratton's presence. What Gratton knew about the incident, if anything, does not appear, but in any event there was never any contention of a weapon, and it is hard to be presumed that Gratton felt assault with a dangerous weapon felony was involved, because ultimately the Government charged in Count I by means of a shod foot. There was no probable cause for the arrest of Brooks as to the assault incident at that time, and that was precisely the purpose in getting together in the office in order to ascertain what had happened. Mr. Lombardy left the office, either when the police arrived or shortly thereafter, and as a consequence could not have imparted information to them. In addition, he did not at that time know what had happened. As a consequence, it is submitted that the only possible legal basis for the arrest was a legal afterthought of disorderly conduct with which the defendant was not charged, based on alleged obscenities.

It is submitted from the record that any obscenities that occurred, transpired prior to the tussling, at which time the officer testified. Based upon the preliminary hearing transcript, the defendant was not under arrest, clearly indicating that he had not been arrested for obscenities. Gratton's own testimony was not that Brooks was disorderly, but that he was bordering on disorderly conduct when Gratton put his hand on his shoulders in the office. (T182). The defendant wouldn't cooperate, wouldn't sit in the chair, and refused to sit down. According to Gratton, he then placed his hands on the defendant's shoulders and asked him to sit down, at which time defendant swung, there was a tussling and defendant was placed in a restraining hold. (T193-194). The defendant denied that he was told at any time he was placed under arrest. Gratton testified that he told Brooks, when he had broken the hold near the cruiser, to quit struggling, that he was being arrested. (T198-199).

It is well settled that an arrest may be made without a warrant if there is probable cause to believe that a felony has been committed, and that the arrested person committed it, or if a misdemeanor has been committed, it was done so in the presence of the arresting officer, 4 D.C. Code 140, Curtis v. U.S. (DCA 1966) 222 A. 2d 840; Smith v. U.S. (DCA 1968) 247 A. 2d 293. Probable cause is viewed from the viewpoint of a prudent and cautious police officer at the scene at the time, and the question to be answered is whether such an officer, in the particular circumstances, conditioned by his observations and information, and guided by the whole of his police experience, reasonably could have believed that a crime has been committed by person to be arrested. Jackson v. U.S., 112 U.S. App. D.C. 260, 362 F. 2d 194; Wright v. U.S., (DCA 1968) 242 A. 2d 833. If, in effect, the defendant was actually being arrested or held for investigation, this was illegal. Gatlin v. U.S., 117 U.S. App. D.C. 123, 326 F. 2d 666. If the arrest was illegal, the defendant had the right to resist. John Bad Elk v. U.S., 177 U.S. 529, U.S. v. DiRe 332 U.S. 581.

> "****The practice of arresting without a warrant when it is practicable to obtain one is not to be encouraged. On the contrary, in a doubtful and marginal case of probable cause, an arrest may be sustainable on a warrant, where without one it would fail." Ford v. U.S. 122 App. D.C. 259, 352 F. 2d 527; U.S. v. Ventresca 380 U.S. 102.

It is true that words similar to those alleged to have constituted the obscenities here have been held per se to have constituted disorderly conduct and without constitutional protection. Johnson v. U.S. 125 U.S. App. D.C. 243, 370 F. 2d 489; Duncan v. U.S. 219 A. 2d 110, cause remanded on other grounds, 126 U.S. App. D.C. 371, 379 F. 2d 148. Both Johnson and Duncan, supra, indicate that the circumstances are to be considered. The Court also

found in Duncan that assuming argumendo, a breach of the peace might occur that such words so constitute such breach. The defense contends that such words which might formerly have constituted fighting words are not so today. It further contends that in street parlance, such words in some communities are as common as hell and damn. That the words might be personally offensive to the officer should not be the test in the balancing of constitutional rights. The Court indicated in Duncan and 22 D.C. Code 1107, the disorderly conduct must take place in a public place. It is submitted that the office of a principal and/or assistant principal of the school is not a public place. The fact that the students were escorted to that office for the purpose of interrogation indicates to the contrary.

In summary of this portion of the argument, it is submitted that defendant was unlawfully arrested; that he had a right to resist such arrest; and that his resistance was reasonable under the circumstances. It is further submitted that if his arrest were lawful, that the use of a restraining hold and handcuffs in placing the defendant in the squad car constituted excessive force, and his resistance thereto reasonable. As a consequence, the defendant was entitled to an acquittal as a matter of law, and there was insufficient evidence for the Jury, the verdict being contrary to both the law and the evidence.

IV. Court Erred in Permitting Testimony of Defendant as to Whether he Tried to Defend, and Knew he Should Help Mr. Dildy, The Teacher.

The defendant was asked on cross-examination if he had tried to defend Mr. Dildy, and if he knew that he should help a teacher. (T315). This is entirely immaterial to the issue of whether defendant assaulted Dildy, and

further presupposes, laudable as it may be, that one should help a teacher. Whether designed or not, the questions were prejudicial to the defendant. It makes no difference that the questions were directed with reference to Dildy and not Gratton, and that as to Dildy, the defendant was found not guilty. Prejudice against the defendant cannot be so compartmentalized, and is not eliminated simply because the Jury did in fact find the defendant not guilty as to Count I, where there were numerous factors indicating that in fact the defendant was clearly not guilty even on the Government's only theory, aiding and abetting, which could be presented on that count.

V. <u>The Government in its Closing Argument Made a Marked Appeal to Sympathy For The Government's Witnesses by Virtue of Their Occupational Status</u>.

In the Government's closing argument, reference was made to the testimony of the witness, Kersey. Although Mr. Kersey was a teacher at Anacostia High School at the time of the incident, he was at the time of trial the Administrative Director of the Department of Justice of community relations services. This was pointedly referred to. (T359). Mr. Dildy was referred to as a teacher who taught at Anacostia High School and was at the time of trial teaching at another high school, and was a teacher who had dedicated his life to teaching. Lombardy was referred to as the Assistant Vice Principal of Anacostia High School, who had taught for twenty years in the public schools. (T359-360). The Government's witnesses were further referred to as those who had taught in the public schools in the District of Columbia and had given their careers to educating young men and women of the District. (T360). The Motion for Mistrial was denied. (T361).

It is true that in Jackson v. U.S., 123 U.S. App. D.C. 276, 359 F. 2d 260, cert. den. 385 U.S.A. 87, it was held in closing argument that references to the "reputable officers" and "very sweet" complaining witness did not exceed permissible advocacy on the part of the Government. As mentioned preceding in this Brief, in view of the nature of the charges, the complainants, being police officers and a teacher, and the backdrop of violence in schools, it was imperative that occupational background not be emphasized. Government's closing argument should confine itself to those matters which are relevant to facts or issues in the case. The prosecutor has a high duty to prosecute fairly. Although he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods to produce a wrongful conviction as it is to use illegitimate means to bring about a just one. Berger v. U.S., 295 U.S. 78; Viereck v. U.S., 318 U.S. 236; Brown v. U.S., 125 U.S. App. D.C. 220, 370 F. 2d 242.

VI. Not Only Did The Court Err in Instructing The Jury That in Determining The Legality of Arrest They Might Consider All The Circumstances Leading up to The Arrest, But Also Clearly Erred in Instructing That if an Officer Seeks to Make a Bona Fide Arrest and Uses Reasonable Force in so Doing, That a Defendant Has no Right to Resist.

The Court instructed the Jury that in considering whether the officer acted as a reasonable man would, they might take into consideration all circumstances leading up to and surrounding the arrest, and also any knowledge which he possessed concerning the danger with which he was confronted. (T393). Although this instruction may have been given in the context of considering the reasonableness of force applied, nevertheless, it was not distinguished from the requisite knowledge to constitute probable cause to make the arrest. (T393-394). The instruction was somewhat in conformity with the decision of

this Court in Barrett v. U.S., 62 App. D.C. 25, 64 F. 2d 148. It is to be noted that in Barrett, the officer was a defendant and was convicted below on on an assault allegedly committed in the course of apprehending an alleged murder suspect. Although an officer may have acted reasonably to constitute a defense to assault, the same facts upon which he acted may not constitute probable cause to justify an arrest. As to probable cause, assuming arguendo that Brooks was arrested for felony assault (dangerous weapon shod foot), nevertheless, the legality of that arrest should have turned on the officer's observation and information, and not all circumstances that may have been testified to at the trial. See Jackson and Wright (supra). Appelland did not object to that portion of the instruction, but asks the Court to take cognizance of it under the circumstances of this case as plain error.

The Court did instruct the Jury that a person has no right to resist a police officer when the latter, in the course of his duties, seeks to make a lawful arrest and does not use unnecessary force; and that if he deems the arrest is illegal and without probable cause, he must still submit. (T394). This was objected to and the Court reiterated that it was a correct exposition of the law. (T398-399).

John Bad Elk and DiRe (supra) held that one had the right to resist unlawful arrest. This was reaffirmed in Abrams v. U.S., 99 U.S. App. D.C. 46, 237 F. 2d 42, cert. den. 352 U.S. 1018, with the caveat, however, that this right did not extend to killing an officer, although it might reduce a homicide from murder to manslaughter.

U.S. v. Heliczer (C.A.N.Y. 1967), 373 F. 2d 241, cert. den. 388 U.S. 917; is very much in point on the question presented. In Heliczer, one Martin was found guilty by a Jury of violation of 18 U.S.C. 111 by assaulting and resisting and interfering with arrest by a Federal Narcotics agent. Further, it appears that Martin was arrested on July 23, 1965, for violation of Federal Narcotic laws in reliance upon information received from an informant Cutler. On July 30, 1965, Martin was released on pre-trial bail and later learned that Cutler was the informant. He allegedly later told Cutler that Cutler was a "dead man". The Federal agents warned Martin to stay away from Cutler, but Martin did not do so. The agent learned Martin was to address a rally on August 11 and went there in plain clothes and there arrested him without a warrant.

Under 26 U.S.C. 7607, arrests are limited to Federal Narcotics agents without a warrant to violations of narcotic laws. The Government conceded the only lawful basis in Smith's case for the arrest without a warrant was under New York Criminal Code, which authorized a private person to arrest one who had committed a felony. The felony in this instance was claimed to be the act of threatening Cutler with death. The Trial Justice left the issue of the threat to the Jury. In addition, the Trial Court gave a favorable charge to the defendant, stating that the Jury must find the agents were acting in the performance of their official duty, and if they find Martin had threatened Cutler and that the agents were arresting him for that, then they were performing their official duty. On appeal from the Jury conviction, the Appellate Court held that this instruction was too favorable to defendant, as it equated the area of the official duty of the agents within the boundaries

within which an arrest could be lawfully made. Consequently, if the Jury found the threat had not been made, then they would, in the posture of the instructions, have found the agents not acting in their official duties and would have had to acquit. The Court stated at p. 246:

> "The arrest, as previously stated, was one made under the authority of the New York statute which makes lawful an arrest of another by a private person when the person arrested has committed a felony. As the Jury found that Martin had committed a felony, his arrest was lawful. Except for the Trial Court's mistake in giving an instruction too favorable to the defendant, the finding that the arrest was lawful could not have been truly ascertained, because after the Trial Court charge on the matter of what circumstances would have called for a finding that the arrest was illegal and the right of Martin to resist such an illegal arrest, the Court erroneously charged that once Martin was actually arrested, he would not then be justified in continuing his resistance. Consequently, it would not have been clear whether the verdict of guilty was based upon proof beyond a reasonable doubt of all of the elements of the offense or upon Martin's continued resistance after he was actually taken into custody during his resistance to an unlawful arrest***". (Underscoring supplied)

In Heliczer, the Second Circuit Court of Appeals noted in footnote 3 to p. 246 of opinion of the efforts to change the existing law to require a citizen to submit to arrest whether or not there is a legal basis for it where he believes he is being arrested by a police officer and no unreasonable force is being used. The Court of Appeals makes reference in that regard to Section 5 of the Uniform Arrest Act and Section 304(2)(a)(1) of the Model Penal Code adopted by the American Law Institute in 1958. The Court further noted that the right to resist illegal arrest has been abolished by the legislatures of Vermont, New Hampshire, Delaware and California, and by judicial decision in New Jersey. Further, at the time of the decision in Heliczer (1967), there was similar legislation pending in various States.

It is submitted that whatever the merits and demerits may be to require submission to legal bona fide efforts to make an arrest, any such change of existing law and the right to defend against an unlawful arrest should be made by law and Congress, thereby giving concerned citizens, communities, officials and those interested, an opportunity to be heard. The portion of the instruction referred to was error, and as in Heliczer, it is not possible to determine whether the Jury's decision was based on this erroneous instruction or not.

CONCLUSION

It is submitted that the defendant is entitled to the following relief, alternatively: (a) vacation of entry of judgment of conviction and entry of judgment of acquittal; (b) reversal and remand for new trial.

Respectfully submitted,

FELDMAN AND FITZPATRICK

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,055

UNITED STATES OF AMERICA, APPELLEE

v.

ALLEN D. BROOKS, APPELLANT

Appeal from the United States District Court for the District of Columbia

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United States Attorney.

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Cr. No. 26-69

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TABLE OF CASES

OTHER REFERENCES

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* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Whether the trial court properly denied appellant's request to inquire on *voir dire* about the potential jury's belief that a police officer is due respect and cooperation?

II. Whether the trial court properly prevented appellant from stating whether or not he was informed he was under arrest for disorderly conduct?

III. Whether the evidence was sufficient to sustain appellant's conviction?

IV. Whether the trial court erred in its instructions to the jury regarding the circumstances of appellant's arrest?

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* This case has not previously been before this Court.

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On January 14, 1969, appellant was indicted for assault with a dangerous weapon (shod foot) and assault on a member of the police force (22 D.C. Code §§ 502, 505 (a)). After a trial on November 20, 21, 24 and 25, 1969, before the Honorable Oliver Gasch and a jury, appellant was found not guilty of assault with a dangerous weapon and guilty of assault on a member of the police force.[1] On February 17, 1970, appellant was sentenced to a term of indefinite commitment pursuant to the provi-

[1] The jury was also instructed on the lesser included offense of simple assault as to each count (Tr. 390, 395, 402). Appellant was acquitted entirely on the assault with a dangerous weapon charge.

sions of the Federal Youth Corrections Act (18 U.S.C. § 5010 (b)). This appeal followed.

On Friday, November 8, 1968, Mr. Jimmie Dildy, a teacher at Anacostia High School, was en route to an office between 1:15 and 1:30 p.m. when he observed a group of young men, approximately eleven or twelve, congregated in the corridor on the second floor of the high school (Tr. 49-51). After inquiring why they were in the hall rather than in class, and receiving no response, he related that the principal of the school would be notified. As he proceeded to the office of the principal, someone attacked him and "[t]hey began to beat me brutally" (Tr. 50-51). The attack came from the rear and culminated in his being floored and kicked (Tr. 52). Mr. Dildy was able to identify only Erwin Corlley as a participant (Tr. 53).[2] The testimony concerning the fight between Mr. Dildy and his assailants was corroborated by three other teachers who arrived on the scene in response to the noise. Neither Mr. William Fry (Tr. 70-83), Mrs. Marian Howard (Tr. 83-93), nor Mr. Harold Liberman (Tr. 93-116) was able to identify appellant as one of the individuals who struck Mr. Dildy. Mr. Lieberman, however, did testify that appellant was one of the individuals "circling Mr. Dildy" while he was physically engaged with another combatant (Tr. 111, 113). Further, appellant was identified as one of the individuals seized at the scene and taken to the principal's office (Tr. 103-104).

Mr. E. Franklin Kersey, a teacher at the school, testified that he too responded to the scene and observed Mr. Dildy standing against the wall with blood streaming down his face and Mr. Russell Lombardy, the assistant principal, and Mr. Robert Roush, the school custodian, grappling with two young men. Mr. Lombardy pushed

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[2] While Mr. Dildy was unable to identify appellant in court as one of the assailants, he did state that if appellant were one of the young men he saw at the precinct, then he stated at that time that he was one of the assailants. Upon objection from appellant, that statement was stricken from the testimony by the court by an immediate instruction to the jury (Tr. 54, 57).

the individual he was holding to the floor, and as he attempted to rise, Mr. Kersey grabbed him and held him. The individual whom Mr. Kersey eventually held was appellant (Tr. 118-120). Mr. Lombardy testified that when he arrived he assisted in quieting the scene, and appellant and a companion were removed to his office at his request (Tr. 141-144). He further testified that he apprehended appellant and "threw him back to Mr. Roush" (Tr. 143). Roush testified that when he arrived Mr. Dildy had his back to the wall, and three persons were punching him. One of the three, appellant, was apprehended by Mr. Lombardy and handed to Roush, and he in turn handed appellant to Mr. Kersey (Tr. 170).

Appellant and Erwin Corlley were taken to Mr. Lombardy's office after the fracas. Mr. Lombardy instructed them to be seated and get their "stories straight, because I am going to have you locked up" (Tr. 144). Some police officers arrived and joined Mr. Lombardy, appellant and Corlley in the room adjoining Mr. Lombardy's office. He left the office and returned after quieting the students (Tr. 147). One of the officers was David Gratton, assigned at that time to the 11th Precinct of the Metropolitan Police (Tr. 177-178). After his arrival, Officer Gratton was in the conference room with appellant, Erwin Corlley, and his own partner, Officer Robert Budd (Tr. 178-179), when appellant "stood up and became very boisterous and disorderly, shouting different obscenities . . . in regard to some of the teachers" (Tr. 181). After appellant was advised to maintain his seat, Officer Gratton placed his hand on one of his shoulders and again advised him to be seated. Appellant then swung at the officer (Tr. 182). Officer Gratton placed a restraining hold on appellant and took him outside to his scout car (Tr. 182). En route to the scout car, appellant struck the officer in his right side with his elbow and broke the hold. With the assistance of Officer Charles Lancaster, appellant was forced to the ground and handcuffed with his hands behind him. At no time was appellant struck

with either a fist or any instrument (Tr. 184-186). Appellant was then placed in the back of the scout car. When he was seated on the back seat, he rolled upon his back and proceeded to kick Officer Gratton in the chest and the face, causing Officer Gratton to fall on his back (Tr. 186-188).[3]

On cross-examination Officer Gratton related that he never verbally placed appellant under arrest, but he did advise him that he was "being detained pending an investigation of an assault that occurred in the high school" (Tr. 203). Officer Gratton further indicated that the assault in the police vehicle occurred after appellant was placed in the back seat and the door closed. Fearing that appellant was attempting to damage the interior of the vehicle, Officer Gratton reopened the vehicle door and was thereupon kicked in the chest and face by appellant (Tr. 212-213). On redirect examination Officer Gratton testified that while appellant was not officially under arrest at the time of the officer's arrival, he would not have permitted appellant to leave until the matter of the assault was fully investigated. When appellant "became disorderly and attempted to assault" him, Officer Gratton placed him under his custody for that assault (Tr. 219).

Officer Gratton's testimony as to what occurred in the conference room was corroborated by his partner, Officer Budd (Tr. 236-241). Officer Charles Lancaster corroborated Officer Gratton's testimony commencing with appellant's attempt to strike Officer Gratton and the sub-

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[3] Officer Gratton, as a result of the kicking, was taken by another officer to the hospital (Tr. 188-189). Dr. Charles Calao treated him at Cafritz Hospital initially for the injuries (Tr. 36-38). Thereafter Officer Gratton was transferred to the Washington Hospital Center, where he was treated by a member of the Board of Police and Fire Surgeons, Dr. William Strong. At the time of his examination, Officer Gratton was lying in bed and breathing with difficulty. He was receiving intravenous feedings and oxygen by face mask. Although the doctor's initial concern for possible intra-abdominal injury proved unnecessary, his final diagnosis was "multiple contusions and abrasions of the chest and abdomen." Officer Gratton remained hospitalized for four days (Tr. 223-228).

sequent assault (Tr. 250-258). Mr. Kersey also testified to the events occurring from the time that Officer Gratton and appellant left the office to the time they reached the scout car. He stated that appellant was not walking willingly and was being restrained by Officer Gratton. After an altercation which elicited the assistance of another officer, appellant was placed in the back seat of the scout car. Mr. Kersey then observed Officer Gratton fall backwards (Tr. 123-126). Mr. Kersey denied that appellant was at any time struck by an officer (Tr. 125-126). At the conclusion of the testimony of the police officers the Government rested (Tr. 264). Appellant moved for a judgment of acquittal on both counts; the motion was denied (Tr. 264-266).

On behalf of appellant, Erwin Corlley testified that he had been with appellant throughout the occurrences (Tr. 270-272). Mr. Corlley stated that when he walked through a door on the second floor, Mr. Dildy grabbed him by his windbreaker and started hitting him (Tr. 272). After the fight in the conference room appellant stood up to get some air, and a police officer shoved him in a chair and then grabbed him by the neck and the arm and dragged him out of the room. At the scout car he saw appellant being shoved into the car and struck with a "police stick" (Tr. 273-274).

Miss Deborah Corlley, sister of Erwin, testified that she was at school when the altercation took place. She was able to observe Mr. Dildy attack her brother and the resultant fight. She also said she saw appellant as he was led to the police car. Appellant asked the officers to let him go, but the officers refused and forced him to enter the car. After appellant was in the car, one of the officers reached in and struck him with a blackjack (Tr. 286-290).

Appellant testified that the fight started when Mr. Dildy attacked Mr. Corlley. He never struck Mr. Dildy but was struck by someone else, suffering a cut over his eye. Mr. Kersey then grabbed him. The next thing ap-

pellant remembered was being in the conference room. Since he was dizzy from being struck, he went toward the window to get some fresh air. The officer, however, kept pushing him down in his chair and eventually grabbed him by the neck and dragged him outside (Tr. 299-303). Appellant was unable to breathe as he was being escorted to the cruiser, but the officer refused to release the hold . His predicament was aggravated by the handcuffs which had been placed on him when he entered the school office (Tr. 303-304). He was thrown headfirst into the cruiser and struck with a stick. He denied ever kicking Officer Gratton (Tr. 306-307).

Mr. Lieberman testified, after being recalled by the defense, that appellant stood up in the conference room and that after the officer told him to sit down, a "tussle" commenced when appellant refused to do so. Appellant was then removed from the office (Tr. 320-324). One other witness was called and testified on a matter not pertinent to this appeal (Tr. 330). Thereafter appellant rested (Tr. 332).

Prior to the charge to the jury, counsel for both parties discussed with the court the matter of instructions. The Government requested an aiding and abetting instruction, which request was granted with a modification. Appellant requested an instruction that he could resist an unlawful arrest and that if the police used excessive force in their arrest, appellant could use reasonable force to oppose it. The instruction which the court intended to give (and later did give at trial) was shown to defense counsel, who objected to the part stating that the jury might consider all the facts when determining if a lawful arrest occurred, *i.e.*, facts that were both known and unknown to the officer. No other objection was registered (Tr. 333-346).

ARGUMENT

I. The trial court properly denied appellant's request to inquire on *voir dire* about the potential jury's belief that a police officer is due respect and cooperation. (Tr. 20-24).

On *voir dire* of the prospective jury panel appellant asked the following questions:

> Q. Do any of you feel that in any situation, even if he were not under arrest, that if he were asked questions by a police officer that he must respond to these questions?
>
> * * * *
>
> Q. Do any of you feel that you must respect an officer, because he is an officer?
>
> * * * *
>
> Q. Do any of you feel that if one is disrespectful to an officer—. (Tr. 20-21.)

Appellant alleges that the trial court's refusal to permit elicitation of responses to these questions constituted reversible error.

No precise criteria exist for the manner in which a *voir dire* is to be conducted or the questions which properly may be propounded. The obvious goal, however, is to produce an impartial jury:

> Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula. *United States* v. *Wood*, 299 U.S. 123, 145-146 (1936).

Since no established litany prescribes the methods used to produce an impartial jury, the trial court necessarily possesses a broad discretion in determining what questions most likely will attain the objectivity sought. The exercise of that discretion, however, is governed by fundamental concepts of fairness. *Brown* v. *United States*, 119 U.S. App. D.C. 203, 338 F.2d 543 (1964).

The first question which appellant unsuccessfully sought to propound clearly went beyond the limits of a jury's proper concern. As noted by the trial court (Tr. 21), this Court has had occasion to comment specifically on the duty of a citizen to cooperate with a police officer in the performance of his official duties. *See, e.g., Coates* v. *United States*, 134 U.S. App. D.C. 97, 413 F.2d 371 (1969); *Hicks* v. *United States*, 127 U.S. App. D.C. 209, 382 F.2d 158 (1967).

The second question was excluded by the trial court because "most of the members of the panel would feel that they would respect a policeman" (Tr. 21). Defense counsel at the time not only failed to object to the trial court's ruling but acceded to it by stating, "Your Honor, I don't dispute that" (Tr. 21). Appellant should not now be heard to complain, particularly in light of his acknowledgment at trial of the correctness of the court's position.

The third question, terminated by the trial court prior to its completion, ostensibly was asked to determine if any members of the panel would believe that a person who was disrespectful would have a greater propensity to commit an assault. The trial court based its ruling in denying appellant the right to ask the question on the ground that disrespect was immaterial to the question of assault. Clearly the trial court was correct in its determination. Assault is an offense requiring only proof of a general intent. *See Parker* v. *United States*, 123 U.S. App. D.C. 343, 359 F.2d 1009 (1966). Whether or not appellant was disrespectful to a police officer was immaterial to any issue before the jury.

II. The trial court properly prevented appellant from stating whether or not the police officer told him he was under arrest for disorderly conduct.

(Tr. 307-308)

Appellant contends that the trial court improperly prevented him from testifying that the police officer who arrested him and was the subject of the assault never

advised him that he was under arrest for disorderly conduct. He further contends that since his defense, as an alternative,[4] was that he was entitled to use reasonable force to resist an unlawful arrest, it was imperative that the jury realize that he did not know he was under arrest since no one had so informed him.

On direct examination appellant was asked if he had been charged with disorderly conduct. The prosecutor objected, and the trial court sustained the objection (Tr. 307-308). The trial court reasoned, quite properly we maintain, that whether or not appellant was ever charged with disorderly conduct was immaterial to the proceedings at trial. The proper question to propound, and the question permitted by the court, was "Did any officer tell you you were under arrest when you were taken out of the school?" (Tr. 308). Since appellant responded negatively to this question, the issue of whether or not he was informed that he was under arrest quite properly was for the consideration of the jury, as well as the resultant question of what, if any, force he was entitled to use. Appellant's argument here misconstrues the issue. The trial court's action was proper and should be upheld.

III. The evidence was sufficient to sustain appellant's conviction.

(Tr. 181-182, 392-395)

Appellant next contends that the evidence was insufficient to support his conviction of assaulting a police officer. Initially he maintains that the officer had no authority to detain him since the only offense which had been committed was an assault on a teacher, which assault was committed out of the presence of the officer. The law in the District of Columbia is expressly to the contrary. A police officer is specifically authorized by statute to arrest without a warrant any person whom he has

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[4] Apparently appellant's principal defense was that he never struck the officer as alleged.

probable cause to believe committed an assault, regardless of whether or not the assault was committed in his presence, subject to certain conditions which are clearly met here. *See* 4 D.C. Code § 140 (b), (c) (1) (Supp. III 1970).

Assuming *arguendo* that appellant was not actually arrested but was merely being detained for purposes of fully investigating the complaint, he had a duty to respond to reasonable requests and inquiries of the police officer. *Coates* v. *United States*, *supra*. At the point when he became unruly and boisterous, the officer correctly could request and anticipate cooperation. However, when appellant swung at the police officer, the officer was justified at that time in effecting an arrest for *that* assault. Thus, regardless of which assault actually gave rise to the arrest, there can be no question that the arrest was lawful.

Appellant next asserts that regardless of the legality of the arrest, he was entitled to resist the officer on a theory of either an unlawful arrest or a lawful arrest and excessive force utilized by the officer. While we disagree with appellant's analysis,[5] it is clear that his argument is bottomed on the theory that there existed some conflicting evidence at trial concerning the arrest and the events thereafter. This contention only raises the issue of credibility, however, and "[i]t is well settled that questions of credibility of witnesses and the comparative weight to be given their testimony are properly within the province of the jury." *Thompson* v. *United States*, 88 U.S. App. D.C. 235, 236, 188 F.2d 652, 653 (1951); *see also Johnson* v. *United States*, 138 U.S. App. D.C. 174, 426 F.2d 651 *(en banc)*, *cert. granted*, 400 U.S. —— (1970). In the case at bar "the jury chose

[5] It is our position that the force used by appellant was excessive under any circumstances, including the alleged circumstance that the officer used excessive force in effecting the arrest. *See, e.g.*, *John Bad Elk* v. *United States*, 177 U.S. 529 (1900), *Abrams* v. *United States*, 99 U.S. App. D.C. 46, 237 F.2d 42 (1956), *cert. denied*, 352 U.S. 1018 (1957).

to believe the complaining witness [and not appellant] as was its right, and there is evidence to support its conclusion." *Thompson* v. *United States, supra,* 88 U.S. App. D.C. at 236, 188 F.2d at 653.[6]

IV. The trial court did not err in its instructions to the jury.

(Tr. 392-395)

Appellant argues that the trial court erred in its instructions to the jury. He claims first that the court erred by instructing the jury, "In considering whether the officer acted as a reasonable man would have, you may take into consideration every circumstance leading up to and surrounding the arrest, and also any knowledge which the officer possessed concerning the danger with which he was confronted" (Tr. 393), and second, that the court erred by instructing that a person has no right to resist when an officer seeks to make a lawful arrest (Tr. 394). Taking each contention in order, we submit that there was no error.

Appellant's first claim of error is bottomed on his belief that the instruction, by referring to the right of the officer to consider all the circumstances, created confusion since the jury may well have believed that the court was speaking of the factors necessary to constitute probable cause for an arrest. Therefore, he argues, by not distinguishing this aspect from probable cause, the court gave an improper standard to the jury by which they could determine the validity or invalidity of the arrest. Initially we maintain that the instruction as given was proper, since an officer may review all the circumstances known to him, including possible danger of physical harm, when effecting an arrest. *Barrett* v. *United States,* 62 App. D.C. 25, 64 F.2d 148 (1933).

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[6] We note that the jury was properly instructed on all aspects of the case. The trial court permitted the jury to determine not only the lawfulness of the arrest but instructed them at length on reasonable and excessive force (Tr. 392-395).

The instruction as given quite properly directed the attention of the jury to the question of whether the force used by the officer was reasonable or excessive. Since the force necessary to arrest an armed murderer necessarily may be greater than that necessary to arrest a traffic violator, for the jury to understand what constitutes reasonable force it must consider the factors known to the officer at the time the arrest was made. *Id.*

Furthermore, the court immediately followed its instruction on reasonable force by charging the jury as to the circumstances under which an officer may properly make a warrantless arrest. No reference was made to considering the circumstances surrounding the arrest (Tr. 393-394). Finally, it was not only proper but necessary that the jury be instructed concerning the circumstances known to the officer and what, if any, danger he believed might exist because of the very nature of the crime alleged. Clearly, in effecting an arrest of one charged with assault, an officer necessarily would be cautious. The very nature of the crime charged permitted the officer to use protective force which might not be compelled in other arrests, *e.g.*, an arrest for forgery. The jury quite properly was notified that this factor could be considered in determining reasonableness.

Appellant also contends that the trial court erred when it instructed the jury that a person has no right to resist a police officer when he effects a *lawful* arrest. While appellant cites a number of cases in support of his proposition,[7] he has not cited one case which provides that a man may resist a lawful arrest. Additionally, the trial court told the jury immediately prior to the instruction in question "that the defendant is entitled to resist an unlawful arrest provided he uses only such force as appears reasonably necessary under the circumstances to

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[7] *United States* v. *DiRe*, 332 U.S. 581 (1948); *John Bad Elk* v. *United States*, *supra*; *United States* v. *Heliczer*, 373 F.2d 241 (2d Cir.), *cert. denied*, 388 U.S. 917 (1967).

avoid such unlawful arrest" (Tr. 394). Appellant's contention is thus without merit.[8]

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[8] Appellant's other contentions are meritless:

(1) Appellant argues that error was committed when the court permitted the prosecutor on cross-examination to ask appellant if he attempted to aid Mr. Dildy and if he knew he should help a teacher. Initially we note that both questions relate to the count of the indictment upon which appellant was acquitted. Moreover, the questions as proffered were correct, albeit inartfully drawn, in that they were both directed toward the issues before the jury. The first question, whether he attempted to aid the teacher, aided in establishing not only appellant's presence in the vicinity but his purpose in being there. The second question, whether he knew he should help a teacher, probed the state of mind of appellant and questioned his purposes in participating in the fracas.

(2) Appellant also argues that the prosecutor committed error by making certain remarks in his closing argument which, according to appellant, were made to bolster the credibility of his witnesses. We note that all but one of the remarks were concerned with individuals who testified solely as to the assault on Mr. Dildy. Since appellant was acquitted of that charge, his complaint here is moot. The other reference concerned itself with the employment of one of the witnesses who testified that he observed no police brutality, a matter of collateral importance since appellant denied ever striking the police officer. Additionally the remark made by the prosecutor fell far short of those criticized by this Court in the past. *See, e.g., United States* v. *Stevenson*, 138 U.S. App. D.C. 10, 424 F.2d 923 (1970); *Gibson* v. *United States*, 131 U.S. App. D.C. 163, 403 F.2d 569 (1968); *Harris* v. *United States*, 131 U.S. App. D.C. 105, 402 F.2d 656 (1968); *Jackson* v. *United States*, 123 U.S. App. D.C. 276, 359 F.2d 260, *cert. denied*, 385 U.S. 877 (1966). *Compare Lawn* v. *United States*, 355 U.S. 339, 359-360 n.15 (1958).

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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